IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA and STATE OF LOUISIANA,	
Plaintiffs,	**Civil Action No. 2:08-cv-893**
v.	**Judge Richard T. Haik, Sr.**
CITGO PETROLEUM CORPORATION,	**Mag. Judge Mildred E. Methvin**
Defendant.	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PROTECTIVE ORDER TO QUASH CITGO'S 94 NEW DEPOSITION NOTICES

In accordance with Fed. R. Civ. P. 26(c), the United States and the State of Louisiana seek aid of the Court to protect Plaintiffs from defendant CITGO Petroleum Corporation's improper, unreasonable, and harassing discovery conduct. Plaintiffs urge the Court to issue an Order quashing all of CITGO's deposition notices beyond the final two depositions cooperatively scheduled for October 6, 2009. After taking 8 depositions and cooperatively scheduling 2 depositions for October 6, CITGO has abruptly noticed 94 more depositions to occur in cities across the country – and overseas – during the last week of the nine-month discovery period, including Saturday and Columbus Day. The agreed maximum number of depositions in the Court-approved discovery plan is 20 per side. Without obtaining agreement from Plaintiffs or leave of this Court, CITGO unilaterally sent, on Tuesday night, September 22,

notices for 17 depositions – all noticed to occur on October 6. *See* Ex. 1, Deposition Notices.[1/] The United States had previously agreed to CITGO's request to produce two Coast Guard employees on that day, which brought the total to 19 depositions noticed for October 6. On Wednesday night, September 23, CITGO unilaterally sent notices for 75 more depositions to occur during the last week of discovery, including six notices for Saturday and 16 notices for Columbus Day. *Id.* On Friday afternoon, September 25, shortly after the parties' final meet and confer meeting regarding this dispute, CITGO sent two more notices. *Id.* That raised CITGO's combined total number of depositions noticed or taken to 107. CITGO's unreasonable and harassing tactics, coming just 10-13 business days before the close of fact discovery, violate Rule 30 and the *agreed* discovery plan, constitute bad faith, and serve no purpose but to waste the time of the United States, the State, and now this Court during the closing days of discovery. CITGO's counsel refuses to desist, and Plaintiffs are forced to seek protection from the Court. The appropriate remedy for CITGO's oppressive tactics is to put an end to CITGO's depositions.

BACKGROUND

Discovery in this case began on January 14, 2009, upon submittal of the parties' joint Rule 26(f) Report. ECF Doc. 18, Revised Agreed Scheduling Order. The Court approved the parties' joint 26(f) Report on February 15, 2009. ECF Doc. 20. In the report, the parties agreed to extend the number of depositions to "a maximum of 20 fact depositions taken by each side, unless increased by agreement of the Parties or order of the Court." ECF Doc. 21-2, Rule 26(f) Report, Attach. 1 at 6. The United States originally asked CITGO to agree to 25 depositions, but

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[1/] The deposition notices are each approximately 6-10 pages long. Plaintiffs have included in Exhibit 1 only the transmittal e-mails and the first page of each of the 94 notices. Complete copies (approximately 600-800 pages) can be provided if the Court wishes.

CITGO refused. Ex. 2, E-mail from E. Lewis to J.Barbeau and D. King (Jan. 12, 2009) (transmittal e-mail and excerpt of CITGO's revision of Plaintiffs' proposed discovery stipulation, striking out 25 depositions in favor of 20). Relying on the Court-approved joint 26(f) Report, Plaintiffs adjusted their discovery plans and have proceeded with fact discovery in accordance with the agreed deposition limit and the Agreed Scheduling Order.

As of September 22, 2009, CITGO had taken six depositions and had cooperatively scheduled four more to occur by October 6. During the night of September 22, with 13 business days remaining in the nine month discovery period, CITGO e-mailed notices for 17 depositions of state and federal employees – all scheduled for October 6, 2009. Ex. 1 at 1-2. The United States had already previously agreed to CITGO's request to produce two Coast Guard employees for depositions on October 6 in Florida and Louisiana. In total, CITGO purports to want to take 19 depositions in ten cities in eight states on October 6, 2009. That is ridiculous enough. But then during the night of September 23, CITGO sent out notices for 75 more depositions: 20 depositions were noticed for October 7 in multiple states, 18 depositions were noticed for October 8 in multiple states, 17 depositions were noticed for October 9 in multiple states and abroad, 6 depositions were noticed for Saturday, October 10, and 16 depositions were noticed for Columbus Day, October 12, for people located in multiple states across the continental United States (*e.g.*, North Carolina, Tennessee, Alabama, Louisiana, California, and Washington) and in Guam, Puerto Rico, and Canada. *Id.* at 3-9.[2/] CITGO sent two more notices on Friday afternoon, September 25, shortly after the parties' last meet and confer meeting regarding this

[2/] For development of its case, and working around the two Coast Guard depositions cooperatively scheduled for October 6, Plaintiffs had already scheduled CITGO depositions for October 5, 7, and 8.

dispute. *Id.* at 5. *See* Ex. 3, Local Rule 37.1W Certificate of Counsel.

As of today, CITGO has already taken eight depositions, cooperatively scheduled two depositions for October 6, and noticed three more depositions for the Coast Guard investigators who are the subject of the United States' pending first motion to quash. ECF Doc. 37. That makes a combined total of 107 depositions taken or noticed. CITGO's mass noticing clearly violates the agreed limit in the Court-approved joint 26(f) Report. Moreover, CITGO did not seek agreement to take additional depositions and did not seek an extension from the Court, in violation of Rule 30 of the Federal Rules of Civil Procedure. Instead, it seeks to unilaterally change the rules at the 11th hour.

Prior to CITGO's mass noticing on Tuesday and Wednesday nights, September 22 and 23, the parties had been working cooperatively to schedule and conduct over 20 depositions over the past five months. Depositions of party employees were arranged without the need for formal notices (except for the three that are the subject of the first motion to quash, and even there the timing of the notices and motion were coordinated). Inexplicably, with just over two weeks left in the discovery period, CITGO has abandoned the rational and amicable practice that has served all the parties well up to now.

Counsel for the United States clearly objected when counsel for CITGO first raised the notion of deposing dozens of state and federal employees in the last weeks of discovery. Ex. 4 at 1, E-mails from J. Barbeau to R. Sarver and E. Lewis (Sept. 16 and 21, 2009). CITGO first requested that the United States and the State provide dates and times for depositions of all people identified on the initial disclosures. *Id.* at 2. (E-mail dated Sept. 14, 2009). Counsel for the United States pointed out that CITGO's request was unreasonable, in violation of the agreed

discovery order, and contrary to the parties' practice of requesting and scheduling individual depositions. *Id.* at 1. The United States offered to continue scheduling CITGO requests for individual deponents as it had done throughout the discovery period. *Id.* CITGO's counsel replied that his request was "entirely reasonable." *Id.* at 1. The United States requested that, in the event CITGO persisted with its improper maneuver, CITGO identify its priority depositions up to the cumulative total of 20 because the Plaintiffs would not schedule any depositions beyond that number. *Id.* CITGO declined to provide any preferences in the sequencing of the depositions. *See* Ex. 1. To accommodate CITGO's requests to the maximum extent practicable, the United States and the State have labored to arrange a total of 7 depositions for October 6, 4 depositions for October 7, and 1 deposition for October 8. Ex. 5, E-mail from J. Barbeau to E. Lewis and Rick Sarver (Sept. 28, 2009) (listing the dates, times, and locations of the state and federal employees arranged for depositions next week). That amounts to a total of 20 deponents that Plaintiffs have arranged to produce for CITGO, if the Court does not quash all the notices. It would not be fair or reasonable to ask any more of Plaintiffs.

ARGUMENT

CITGO's notices violate Rule 30 and the parties' Court-approved discovery plan.

Rule 26(c)(1) authorizes the Court to issue orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, among other things, "forbidding the disclosure or discovery." Fed. R. Civ. P. 26(c)(1), (c)(1)(A). CITGO's recent noticing of 94 depositions clearly violates Rule 30 and the parties' discovery agreements in the Court-approved joint Rule 26(f) Report and must be stopped. Under the already extended limit in the 26(f) Report, CITGO can take 20 depositions. It has taken 8 and has now noticed or

scheduled over 90 more depositions for the last week of the discovery period. CITGO's unilateral decision to notice 94 more depositions obviously and greatly exceeds the *agreed* limit of 20.

Rule 30 of the Federal Rules of Civil Procedure mandates that a party seeking to take additional depositions must obtain agreement of the parties or "*must* obtain leave of court." Fed. R. Civ. P. 30(a)(2) (emphasis added). In violation of Rule 30 and the Court-approved Rule 26(f) Report, CITGO did not seek agreement from Plaintiffs to extend the number of depositions and did not seek leave of the Court to take additional depositions. Instead, CITGO decided at the end of the discovery period that it would give itself the right to take 100 depositions.

Rule 30 also requires that a party give "reasonable" notice of the taking of depositions. Fed. R. Civ. P. 30(b)(1). CITGO's attempt to request 19, 20, 16, 18, or 6 depositions per day on back-to-back days at locations across the country (and abroad) and all during the last week of discovery is not reasonable and evidences bad faith. Case law is hardly needed to reach such a conclusion, but the Fifth Circuit addressed a similar situation (although tame in comparison to CITGO's conduct) in *Mims v. Central Mut. Ins. Co.* 178 F.2d 56 (5th Cir. 1950). In *Mims*, defendants scheduled 15 depositions all on the same day (October 6, coincidentally) in ten cities in nine states. *Id.* at 58. The Court held that scheduling 15 depositions for the same day in multiple cities was not "in any sense reasonable." *Id.* at 59 (reversing the trial court and ordering a new trial to remedy the introduction of evidence obtained from the improper depositions). In *Harry A. v. Duncan*, a district court entered a protective order to stop similar last minute harassing deposition maneuvers. 223 F.R.D. 536 (D. Mont. 2004). There, the court addressed a situation where one party noticed 85 depositions for a two-week period at the end of discovery.

Id. at 538. Finding the issuance of the mass notices to be unreasonable and done without prior approval of the court, the court held that "the discovery sought is unduly burdensome and oppressive" and issued a protective order to stop the excessive depositions. *Id.* at 540. CITGO's tactics are many times worse than what was denounced by the Fifth Circuit in *Mims* and at least as bad as in *Harry A.* Here, at the end of a lengthy discovery period, CITGO's sudden claimed need to depose 94 people in the last week of discovery, including during the weekend and on a federal holiday, is clearly unreasonable. The Court should not allow CITGO to take any more depositions.

If CITGO had a true need for additional depositions, it could have and should have raised the concern much earlier. Even if CITGO had a legitimate interest in more depositions, CITGO's lack of diligence should not be rewarded now with extensions of time or increases in the number of depositions. Allowing additional depositions at this late date would prejudice the United States and the State because Plaintiffs relied on the deposition limit agreed to by the parties and conducted its discovery in accordance with the joint 26(f) Report and the Agreed Scheduling Order. CITGO's last minute maneuvers have already interfered with the orderly conclusion of the fact discovery period. The improper notices have caused the United States and the State to spend time and effort tracking down more witnesses than CITGO has a right to depose. CITGO refused to withdraw its improper notices and the Plaintiffs have had to spend more time and effort preparing this motion. Allowing any additional depositions would further take away the time Plaintiffs have to complete their remaining affirmative discovery and then move on to expert reports, which for Plaintiffs are due on November 11, one month after fact discovery closes.

Given the mass noticing and refusal to prioritize the new depositions, it is hard to believe CITGO has any real interest in taking any of the noticed depositions. Based on the history of discovery in this case, it seems that the ten depositions CITGO actually wanted to take were identified specifically and cooperatively scheduled sometime ago. CITGO cannot deny that in every such instance, Plaintiffs made prompt and diligent efforts to produce the deponents (or to object in the case of the three Coast Guard investigators). If CITGO had real interest in taking any of the 94 newly noticed depositions, it was incumbent upon CITGO to try to schedule them before the last days of discovery, especially those noticed for Saturday and Columbus Day. Obviously, "[i]t is difficult to conceive how a party can adequately prepare for 85 depositions within two weeks." *Harry A. v. Duncan*, 223 F.R.D. at 538-39. Plaintiffs cannot be faulted for not being able to produce all of the noticed deponents during the last week of discovery. *Id.* at 539 (denouncing tactics whereby a party will "wait until the last minute to do scores of depositions and then . . . place blame on the other party for the lack of timeliness issues"). The timing of the notices further evidences CITGO's aim to harass Plaintiffs and disrupt the discovery schedule and potentially the trial schedule. Plaintiffs oppose any proposal to extend the fact discovery deadline.

Finally, CITGO has stated in correspondence that its interest in noticing all the recent depositions is to reach all the people listed in the initial disclosures. *See* Ex. 6, E-mail from R. Sarver to J. Barbeau *et al*. (September 21, 2009). But that assertion is specious given the identities of the newly proposed deponents have been known to CITGO since last year when the disclosures were made. ECF Doc. 18, Revised Agreed Scheduling Order (Initial Disclosures were made on December 19, 2008). CITGO's initial disclosure contains more people than

Plaintiffs can depose as well. But Plaintiffs realize there is a practical limit to what can be done in discovery. And the parties agreed to extend the deposition limit to 20 with full knowledge of each side's initial disclosures.

CONCLUSION AND REQUEST FOR RELIEF

Rule 26(c)(1) authorizes the Court to issue orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, among other things, "forbidding the disclosure or discovery." Fed. R. Civ. P. 26(c)(1), (c)(1)(A). Such an order is clearly warranted in this case to stop CITGO's unreasonable and harassing tactics. CITGO's excessive deposition notices are oppressive and unduly burdensome and in violation of Rule 30 and the parties' Court-approved discovery agreements. Plaintiffs have already been forced to waste a considerable amount of time on this motion and attempting to locate and schedule people for depositions. To remedy CITGO's violation of Rule 30 and the parties' discovery agreements, and for needlessly wasting the Plaintiffs' time in the closing days of discovery, the Court should put an end to CITGO's abusive deposition tactics. Plaintiffs urge the Court to uphold the fact discovery deadline in the parties' Agreed Scheduling Order and issue the following relief:

A) Quash all deposition notices issued by CITGO on September 22, 23, and 25, 2009.

B) Allow CITGO to conduct the two depositions that were previously cooperatively scheduled for October 6 (Reams and Lanno).

C) Provide any additional relief the Court deems proper.

If the Court does not grant the just relief requested by Plaintiffs above, the Court should at least uphold the fact discovery deadline in the parties' Agreed Scheduling Order, uphold the 20-deposition limit in the Court-approved joint Rule 26(f) Report, and limit CITGO's depositions to the two cooperatively scheduled for October 6 and the final 10 that Plaintiffs have endeavored to schedule to date. Under this alternative minimum approach, the Court should issue the following relief:

1) Quash all depositions noticed for October 6 that exceed the 7 depositions that have been arranged by Plaintiffs (Reams, Lanno, Jeansonne, Gielazyn, Mills, Andrews, and Bradshaw).
2) Quash all depositions noticed for October 7 that exceed the 4 depositions arranged by Plaintiffs (Kirsch, Dillon, Olivier, and Quarles).
3) Quash all depositions noticed for October 8 that exceed the 1 deposition arranged by Plaintiffs (Wilkinson).
4) Quash all depositions noticed for October 9.
5) Quash all depositions noticed for Saturday, October 10.
6) Quash all depositions noticed for Columbus Day, October 12.
7) Rule that the United States' first motion to quash the deposition notices of the three Coast Guard investigators is moot because CITGO has reached its 20 deposition limit.
8) Order any additional relief the Court deems proper.

Plaintiffs should not be forced to spend any more time scheduling or preparing to defend any more depositions.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources
Division

/s/ Jason T. Barbeau

Jason T. Barbeau
Trial Attorney (D.C. Bar No. 468200)
U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 616-8908 (telephone)
(202) 616-6584 (facsimile)
jason.barbeau@usdoj.gov

DONALD W. WASHINGTON
United States Attorney

KAREN J. KING (#23508)
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, LA 70501-6832
(337) 262-6618 (telephone)
(337) 262-6693 (facsimile)
karen.king@usdoj.gov

Of Counsel:
Edwin M. Quinones
Office of Regional Counsel
Region 6, U.S. EPA
1445 Ross Avenue
Dallas, TX 75202-2733

FOR THE STATE OF LOUISIANA:

Louisiana Department of Environmental Quality
HERMAN ROBINSON,
Executive Counsel (LA # 2077)

/s/ Dwana C. King
DWANA C. KING, T.A. (LA # 20590)
Ted R. Broyles, II (LA # 20456)

Louisiana Department of Environmental Quality
P.O. Box 4302
Baton Rouge, LA 70821-4302
Telephone: (225) 219-3987
Facsimile: (225) 219-4068

Ms. King consented to the filing of this document and the placement of her electronic signature.